Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1757

In The

Supreme Court of the United States

October Term, 1985

ALI A. AZIMA,

Petitioner,

v.

FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION-BOARD OF MEDICAL EXAMINERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

William M. Furlow, Esquire
130 North Monroe Street
Tallahassee, Florida 32301
(904) 488-0062
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ISSUE	1
STATEMENT OF THE CASE	1
REASON WHY PETITION SHOULD BE DENIED	4
CONCLUSION	7
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES CITED

Charleston Federal S&L Ass'n. v. Alderson, 324 U.S. 182, 65 S.Ct. 624 (1945) 6

Church v. Kelsey, 121 U.S. 282, 7 S.Ct. 897 (1887) 5

Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116 (1974) 5

Santa Cruz County v. Santa Cruz R.R., 111 U.S. 361, 4 S.Ct. 474 (1884) 6

Simmerman v. Nebraska, 116 U.S. 54, 6 S.Ct. 333 (1885) 6

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969) 5

Susquehanna Boom Co. v. West Branch Boom Co., 110 U.S. 57, 3 S.Ct. 438 (1884) 6

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981) 6

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663 (1946) 6

STATUTES CITED

Chapter 455, Florida Statute 1

Chapter 458, Florida Statute 1

Section 458.331(1)(t), Florida Statutes 3, 4, 6

Section 768.45, Florida Statutes 2

ISSUE

The Respondent, Florida Department of Professional Regulation—Board of Medical Examiners, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida First District Court of Appeal's opinion in this case. That opinion is reported at 473 So. 2d 761 (1985).

———o———

STATEMENT OF THE CASE

The Respondent accepts Petitioner's Statement of the Case as same relates to Petitioner's Summary of Findings and recommendations contained under subheading A. of Petitioner's Petition for Certiorari.

The Respondent is authorized and empowered under Chapters 455 and 458, Florida Statutes, to investigate the medical practices of any medical doctor licensed under Chapter 458, Florida Statutes, and to take administrative action against any medical doctor determined to have violated Chapter 458, Florida Statutes. Pursuant to this authority, Respondent filed administrative charges against Petitioner alleging that Petitioner's actions on several occasions violated Section 458.331(1)(t), Florida Statutes, which provides:

> 458.331(1) The following acts shall constitute grounds for which disciplinary actions specified in sub-section (2) may be taken:
>
> * * *

> (t) gross or repeated malpractice *or* the failure to practice medicine with that level of care, skill and treatment, which is *recognized by a reasonably prudent similar physician* as being acceptable under similar conditions and circumstances. The Board shall give great weight to the provisions of [Section] 768.45 [Florida Statutes] when enforcing this paragraph. (*emphasis added*) (See full text of Section 768.45 in Respondent's Appendix).

Respondent charged Petitioner with providing substandard care to several of his patients being treated at his clinic in Ft. Myers, Florida. The charges related to the method and procedures used by Petitioner in performing pregnancy terminations and providing birth control services.

Four physicians, all specialists in obstetrics and gynecology (as was Petitioner) and all of whom provide pregnancy terminations and birth control services, testified against Petitioner. These four physicians all practice within the Ft. Myers community, as did Petitioner, at the time Petitioner treated the patients in question. The record reveals that there were six physicians performing pregnancy terminations outside of a hospital setting in the Ft. Myers community at the time of the hearing on Respondent's charges against Petitioner. (see opinion of the District Court of Appeal, 473 So.2d at 761 at 762 n1). Petitioner was one of these six physicians. Four of the remaining five physicians testified against Petitioner at the hearing. *No physician testified on behalf of Petitioner.*

Petitioner's primary position has been that he conducted his practice in full compliance with the published American College of Obstetrics and Gynecology Standards. At the hearing, Petitioner placed great reliance on

reading from this treatise. However, the text was never introduced into the record, was not subject to cross examination and Petitioner's reading of selected passages was not corroborated by any expert testimony. Consequently, this text amounted to virtually meaningless hearsay. At most, the reading from such a text could merely affect the weight to be given to the testimony of an expert witness on behalf of the Petitioner. But the Petitioner offered no expert testimony, therefore the evidentiary weight of the American College of Obstetrics and Gynecology Standards text is nil in this instance. The hearing officer rightly accorded little weight to the text, and accepted the expert testimony of the four physicians presented by Respondent in determining that Petitioner had violated Section 458.331(1)(t), Florida Statutes.

This weighing of the evidence in favor of Respondent predicated Petitioner's filing of exceptions to the hearing officer's Recommended Order before the Board of Medical Examiners, and subsequently was the basis of Petitioner's Appeal to the Florida First District Court of Appeal following the Board's acceptance of the hearing officer's recommendation.

Contrary to the assertions of Petitioner, the federal constitutional questions presented for this Court's review were never raised before the hearing officer in the administrative hearing, the Board of Medical Examiners, or the Florida First District Court of Appeal. The sole issue presented for consideration by the hearing officer and the Board, and the only question presented to the District Court of Appeal was:

THE DEPARTMENT OF PROFESSIONAL REGULATION FAILED TO PRESENT COMPETENT SUBSTANTIAL EVIDENCE THAT [PETITIONER] VIOLATED SECTION 458.331(1)(t), FLORIDA STATUTES.

The hearing officer, the Board, and District Court of Appeal all rejected Petitioner's assertion that Respondent lacked competent substantial evidence that Petitioner's actions violated Section 458.331(1)(t), Florida Statutes, but were never asked to address the federal constitutional challenge to that statutory provision which Petitioner now brings before this Court.

REASONS WHY PETITION SHOULD BE DENIED

1. The federal constitutional questions Petitioner brings to this Court were never raised in the state courts below.

Petitioner comes before this Court with a prayer for the invalidation of Section 458.331(1)(t), Florida Statutes, as being repugnant to the 14th Amendment to the United States Constitution. Petitioner's prayer is grounded upon an assertion of constitutional infirmity not previously brought before a Florida court. In so doing, Petitioner would have this Court ignore precedent (cited infra) and issue a writ of certiorari to decide the fate of a state law, upon a federal question which Petitioner has not afforded the Florida courts an opportunity to address.

Petitioner seeks this writ following a decision by the Florida First District Court of Appeals (hereinafter DCA) which affirmed an Order by the Florida Board of Medical Examiners (BOMEX) imposing disciplinary sanctions

against Petitioner for violation of the challenged statute. In his appeal of the BOMEX Order, to the DCA, Petitioner questioned the sufficiency of the evidence presented against him upon which the BOMEX based its Order. The DCA decision did not speak to the federal question which Petitioner now raises.

The failure of a state court to speak to federal questions has been held presumptive of a failure to have raised those questions before the state court. "This Court has stated that when . . . the . . . state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation to the state courts . . .", *Fuller v. Oregon*, 417 U.S. 40 at 50 n.11, 94 S.Ct. 2116 at 2123 n.11 (1974) quoting *Street v. New York*, 394 U.S. 576 at 582, 89 S.Ct. 1354 at 1360 (1969). Here, the record of Petitioner's appeal to the DCA supports the presumption of Petitioner's failure to present the federal questions to the Florida courts.

Petitioner's casual remarks in his brief before the DCA (see pages 63-71 in Petitioner's Appendix), which Petitioner represents as the portion of the record demonstrating that both federal questions were timely and properly raised in that court, make no reference to the 14th Amendment and very clearly did not frame any constitutional questions for the DCA to decide. "Certainly [they] cannot be found in the record in the form [they have] been stated in the brief of counsel here." *Church v. Kelsey*, 121 U.S. 282 at 283, 7 S.Ct. 897 at 898 (1887). Where an appeal from a decision by a state court comes on a writ of certiorari, the United States Supreme Court can only consider the federal questions passed upon by the state court,

Wilson v. Cook, 327 U.S. 474 at 482, 66 S.Ct. 663 at 667, and it is incumbent upon Petitioner to show that " . . . an explicit and timely insistance [was made] in the state courts that a state statute, as applied, is repugnant to the federal constitution . . .", *Charleston Federal S&L Assn. v. Alderson,* 324 U.S. 182 at 185, 65 S.Ct. 624 at 625 (1945). Petitioner has failed to show that the federal questions he now raises were explicitly presented in any state court.

Where it appears nowhere in the record that the federal questions were raised or presented below, the fact that Petitioner now raises those questions after the final state court decision does not confer jurisdiction on the United States Supreme Court. *Susquehanna Boom Co. v. West Branch Boom Co.,* 100 U.S. 57, 3 S.Ct. 438 (1884). *Simmerman v. Nebraska,* 116 U.S. 54, 6 S.Ct. 333 (1885). To give the United States Supreme Court jurisdiction to revise the judgment of a state court it must appear that the point on which Petitioner relies was made in the state court and decided against him, and that the section of the federal constitution upon which Petitioner relies was brought before the state court. *Santa Cruz County v. Santa Cruz R.R.,* 111 U.S. 361, 4 S.Ct. 474 (1884). Petitioner has not met this requirement.

This Court recently held that before it can take jurisdiction to reexamine the final judgement of a state court, the state court must be afforded an opportunity to respond to a federal constitutional challenge to a state statute. *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889 (1981). The DCA was not afforded an opportunity to respond to the constitutional challenge to section 458.331(1)(t), Florida Statutes, which Petitioner now brings to this Court.

To grant this petition, and issue a writ of certiorari on the basis of the federal questions presented here for the first time by Petitioner would require this Court to ignore overwhelming authority to th econtrary, and to undermine a fundamental tenet of our system of federalism. Accordingly, the writ of certiorari here prayed for should be denied.

———o———

CONCLUSION

Petitioner failed to raise any federal questions in the state courts below, therefore he cannot now bring these federal questions to the United States Supreme Court.

Respectfully submitted,

WILLIAM M. FURLOW, Esquire
130 North Monroe Street
Tallahassee, Florida 32301
(904) 488-0062

Counsel for Respondent

APPENDIX

Section 768.45, Florida Statutes:

(1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s.768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. *The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.*

(2)(a) If the health care provider whose negligence is claimed to have created the cause of action is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who:

1. Is licensed by the appropriate regulatory agency of this state;

2. Is trained and experienced in the same discipline or school of practice; and

3. Practices in the same or similar medical community.

(b) If the health care provider whose negligence is claimed to have created the cause of action is certified by

the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:

1. Is trained and experienced in the same specialty; and

2. Is certified by the appropriate American board in the same specialty.

However, if any health care provider described in this paragraph is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

(c) The purpose of this subsection is to establish a relative standard of care for various categories and classifications of health care providers. Any health care provider may testify as an expert in any action if he:

1. Is a similar health care provider pursuant to paragraph (a) or paragraph (b); or

2. Is not a similar health care provider pursuant to paragraph (a) or (b) but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience, or knowledge must be as a result of the active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.

(3)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed consent of the patient in compliance with the provisions of s. 768.46.

(4) The existence of a medical injury shall not create any interference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

(5) The legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health

care providers. The failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care. (*Emphasis added.*)